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September 27, 2017

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, DC 20554

Re: *Restoring Internet Freedom*, WC Docket No. 17-108

Dear Ms. Dortch:

On September 25th, Jon Nuechterlein of Sidley and Austin, along with Amanda Potter, Christopher Heimann, Gary Phillips, and myself of AT&T, on behalf of AT&T, met with the following members of Commission staff: Kris Monteith, Chief of the Wireline Competition Bureau; Megan Capasio, Joseph Calascione, Deborah Salons, Ramesh Nagarajan, Madeleine Findley, and Daniel Kahn of the Wireline Competition Bureau; Nese Guendelsberger and Garnet Hanly of the Wireless Telecommunications Bureau; and Doug Klein and Marcus Maher of the Office of General Counsel. During the meeting, we discussed several arguments that have been made in the above-referenced proceeding regarding the Administrative Procedure Act. The discussion is summarized in the attached White Paper.

Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

Henry G. Hultquist

CC:
Jon Nuechterlein
Kris Monteith
Megan Capasio
Joseph Calascione
Deborah Salons
Ramesh Nagarajan

Madeleine Findley
Daniel Kahn
Nese Guendelsberger
Garnet Hanly
Doug Klein
Marcus Maher

AT&T

White Paper on APA Issues Related to the Proposed Reclassification of Internet Services

This White Paper addresses arguments by Title II proponents that the Administrative Procedure Act imposes various substantive and procedural obstacles to restoration of a Title I regime for broadband internet access. These arguments are meritless. As discussed below, nothing in the APA requires the Commission to (1) identify any post-2015 change in factual circumstances as a basis for restoring a Title I regime, (2) issue a new NPRM to specify the metrics to be used in a cost-benefit analysis of Title II regulation, or (3) stall this proceeding pending a new round of comments on the significance *vel non* of informal complaints made public in response to FOIA requests.

1. As explained in AT&T's comments, the text of the Communications Act compels the "information service" classification that the Commission applied to broadband internet access until 2015. At a minimum, that classification is *at least* a permissible reading of the relevant statutory definitions, and any argument to the contrary contradicts the Supreme Court's decision in *NCTA v. Brand X Internet Servs.,* 545 U.S. 967 (2005). *See* AT&T Reply Comments 56-57; *see also United States Telecom Ass'n v. FCC*, 855 F.3d 381, 384 (2017) (Srinivasan, J., joined by Tatel, J., concurring in denial of reh'g en banc) ("the agency did not have to" "treat broadband ISPs as common carriers"). Thus, even if the statute were ambiguous on this point, the only question would be whether the Commission has a reasoned policy basis for restoring a Title I approach. The answer is plainly yes because, as we have discussed, the costs of Title II regulation far outweigh the illusory benefits. *See* AT&T Comments 10-59.

In their reply comments, Incompas and the Internet Association ("IA") nonetheless argue that the APA imposes "high barriers" to restoring a Title I regime because "barely two years" have elapsed since the *Title II Order*[1] was issued and there is supposedly no "reliable evidence that the [*Order* has] negatively impacted investment in broadband networks." IA Reply Comments 1-2, 13-14; *see also* Incompas Reply Comments 5-6. That claim founders on both the facts and the law.

To begin with, it is indisputable as a matter of economic theory that any broad scheme of economic regulation imposes costs (which may or may not be outweighed by benefits) on the affected industry. *See, e.g.*, Declaration of Mark Israel *et al.*, ¶¶ 83-93 (July 17, 2017) (attached to AT&T's opening comments) ("AT&T Econ. Decl."). It is also indisputable that those costs are particularly pronounced where, as here, the industry is technologically and commercially dynamic, the regulatory regime imposes broad and unpredictable conduct restrictions, and it generates widespread concerns about regulatory creep. *See id.*; *see also* AT&T Reply Comments 46-51. These observations hold true whether or not these regulatory costs—in the form of forgone investment and innovation—can be measured with precision.

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[1] Report and Order on Remand, *Protecting and Promoting the Open Internet,* 30 FCC Rcd. 5601 (2015) ("*Title II Order*").

Here, such costs are indeed difficult to quantify. Title II regulation was in effect and subject to the Wheeler Commission's control for less than two years before the Commission proposed to repeal it, and plans to invest billions in new technologies or deploy major service innovations generally operate on longer time horizons. *See* AT&T Reply Comments 50-51. We may never know for certain just how much the *Title II Order* would have suppressed investment and innovation if the same Commission leadership that adopted it had remained in power. But that quantification challenge casts no doubt on the fundamental economic reality that overregulation always imposes costs. And in any event, a growing body of empirical research supports what economic theory holds must be true: that overregulation has indeed depressed broadband investment since 2015. *See* AT&T Econ. Decl. ¶¶ 104-109; *see also* AT&T Reply Comments 50-56 (discussing fatal flaws in IA/Hooton and Free Press "studies").

Just as important, Incompas and IA are wrong on the law when they suggest that the APA requires the Commission to cite "new evidence" or "changed circumstances" in order to justify restoration of a Title I approach. The APA does require agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). But "'[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances.'" *Id.* at 57 (quoting *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970)). In particular, an agency is "not required to refute the factual underpinnings of its prior policy with new factual data. The Agency only need[s] to provide a reasonable explanation for discounting the importance of the facts that it had previously relied on." *United States Sugar Corp. v. EPA*, 830 F.3d 579, 626 (D.C. Cir. 2016); *cf. Title II Order* ¶ 360 n.993 (asserting that the Commission would have reclassified even if it had found that "the facts regarding how BIAS is offered had not changed").

It is also entirely permissible for an agency to reverse course because its new leadership disagrees on broad policy grounds with the controversial agenda of the agency's prior leadership. As the D.C. Circuit has held, "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

In short, nothing in the APA requires the Commission to base its reinstatement of an "information service" classification on any findings of fact that post-date the *Title II Order*, such as empirical studies confirming that Title II reclassification has diminished investment. Of course, the Commission can and should place some reliance on those studies, at least in the alternative. But as its primary basis for restoring a Title I approach, the Commission should conclude that, even on the 2015 record, the *Title II Order* struck the wrong balance between regulatory costs and benefits and that indeed the benefits were illusory because there is no record of "bad acts" warranting this unprecedented regime of prescriptive

common carrier regulation. *See* AT&T Comments 10-59; *see also* AT&T Reply Comments 16-23 (addressing supposed "bad acts" cited by pro-Title II commenters). Of course, two of the Commission's current members made exactly that point in dissenting from the *Title II Order*, and nothing has happened in the interim to justify changing their minds. Now that those two are in the majority, it is "perfectly reasonable" for them, on behalf of the agency, to "reapprais[e] … the costs and benefits of its programs and regulations" and alter course "in light of the philosophy of the administration." *National Ass'n of Home Builders*, 682 F.3d at 1043.

Incompas and IA also labor in vain to explain how the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), cuts for their position rather than against it. Whereas Incompas argues (Reply Comments 4-5) that an order restoring a Title I regime will face "heightened scrutiny" on appeal because it will contradict the *Title II Order*, *Fox* in fact *rejects* the proposition that "a court's standard of review is heightened somewhat when an agency reverses course." 556 U.S. at 514 (internal quotation marks omitted). *Fox* goes on to explain that when an agency relies on "factual findings that contradict those which underlay its prior policy," it may not "ignore" those prior findings; it must give a "reasoned explanation" for rejecting or discounting them. 556 U.S. at 515-516.[2] And because the agency must address those prior findings explicitly, the explanation it must give for a policy reversal is necessarily "more detailed" than the explanation it would give if it had previously made no such findings. *Id.* at 515. But the duty to provide that explanation is not a special requirement; it is simply part and parcel of any agency's obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. That explanation, once given, is thus subject to exactly the same standard of judicial review as any other explanation an agency gives to account for other salient facts in the record.

Finally, the same is true of agency explanations accounting for any "serious reliance interests" that prior policies may have engendered. *Fox*, 556 U.S. at 515. In any event, there is no credible argument of "detrimental reliance" here. Incompas asserts that "[b]illions of dollars of investment have flowed into investment at the edge in reliance on the existence of the 2015 rules." Incompas Reply Comments 7. Although edge providers have indeed invested billions of dollars since 2015, they also invested billions in the years leading up to 2015, and neither Incompas nor anyone else provides any empirical basis for speculating that edge investment since 2015 would have been substantially lower in the absence of Title II regulation. Such speculation is meritless because, as AT&T has discussed in prior submissions, Title II regulation is unnecessary to preserve the benefits of an open internet for edge providers.

[2] Even this requirement is inapplicable to the extent that the Commission merely weighs old factual findings differently within its new policy framework. *See Nat'l Ass'n of Home Builders*, 682 F.3d at 1038 ("more detailed justification" requirement inapplicable where agency "did not rely on new facts, but rather on a reevaluation of which policy would be better in light of [previously recognized] facts").

2. Incompas separately argues that, under the APA, the Commission may not reassess the pros and cons of Title II regulation unless it first issues a new NPRM specifying precise metrics for use in a cost-benefit analysis. Incompas Comments at 83-94; *see also* Incompas Reply Comments 13. That argument for delay fails because it rests on a false premise: that the Commission must use such precise metrics to justify its return to a Title I regime. To the contrary, the Commission can and should find more broadly that, statutory definitions aside, (1) the benefits of Title II regulation are negligible because they are unnecessary to solve any market "problem" and (2) the associated costs of forgone investment and innovation are likely substantial even though (as discussed) they are difficult to quantify with precision.[3] Together, those two findings justify elimination of Title II regulation, and the Commission can so conclude without needing to identify "specific methodologies" (Incompas Comments 86) for measuring costs and benefits with exactitude.

For that reason, *Owner-Operated Independent Drivers Association v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007), on which Incompas relies (Comments 87-88), is inapposite. That case involved the use of a highly quantified cost-benefit analysis to calibrate regulations governing the precise number of hours (daily and weekly) that commercial drivers may work before mandatory off-duty time, subject to various exceptions. *Id.* at 197. Here, the Commission need not engage in any similar quantification to reach the qualitative conclusion that any incremental benefits of Title II regulation are negligible and thus outweighed by the inevitable harms of overregulation.[4]

Finally, although an agency must of course "allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process," it "need not renotice changes" that "reasonably develop" its original proposals because otherwise "the comment period would be a perpetual exercise rather than a genuine interchange resulting in improved rules." *Connecticut Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 530, 533 (D.C. Cir. 1982). Here, the existing NPRM already provides a roadmap to the analysis the Commission intends to undertake, and Incompas identifies no reason for converting this proceeding into a "perpetual exercise" of sequential NPRMs.

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[3] Incompas erroneously claims that AT&T has advocated "ignor[ing] the impact of [the Commission's] decisions on innovation and investment from the edge." Incompas Reply Comments at 11. In the passage Incompas cites for this claim, AT&T argues only that any assertion of *section 706 authority* must rest on a strong empirical basis for concluding that regulation will promote broadband deployment. But on the separate question presented here, our central point is that any incremental benefits of Title II regulation—to edge providers or anyone else—are negligible because there is no market problem that such intrusive regulation is needed to solve. *See* AT&T Comments 10-49.

[4] In addition, *Drivers* holds only that when a technical model is "among the most critical factual material" used "to support the agency's position" in a rulemaking, the agency must provide notice and an opportunity to comment on the methodology. *Id.* at 201 (internal quotation marks omitted). Of course, there is no reason to believe that the Commission will ultimately rely on "critical factual material" that interested parties lack an opportunity to address in their comments and *ex partes*.

3. In another effort to throw sand in the rulemaking gears, NMHC and various other groups have demanded that the Commission "incorporate into the record in this proceeding" nearly 50,000 informal consumer complaints (and related materials) and "establish a new pleading cycle to allow for public analysis and comment on them."[5] NMHC claims that, if the Commission denies that request, "any decision in this proceeding would be based on an insufficient and fundamentally flawed record." NHMC Mot. 10.

This is nonsense. The burden lies with a commenting party, not the Commission, to introduce evidence into a rulemaking record that the party believes should influence the Commission's decision. NHMC could have assumed that burden but has simply decided not to do so. In response to NHMC's FOIA request, the Commission has now provided all of the informal complaints that NHMC sought and indeed has posted them on its website.[6] NHMC has been free to file any of those complaints into this docket along with an explanation of why they are relevant, and indeed it remains free to do that today under the Commission's liberal *ex parte* rules. Yet NHMC has done no such thing; instead, it appears content to cite the mere existence of these complaints as a pretext for delay.

Of course, it would not be enough for NHMC now to dump all of these informal complaints into this docket; it must also identify relevant complaints, explain what they add to the already voluminous record, and address in particular why, in NHMC's view, those complaints present substantial new evidence of systemic and previously unalleged "problems" that Title II regulation is needed to address. As the D.C. Circuit has held, "'a litigant before the Commission ... ha[s] at least a modicum of responsibility for flagging the relevant issues,'" and the Commission "'need not sift pleadings and documents to identify arguments that are not stated with clarity[.]'" *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 79 (D.C. Cir. 2003) (quoting *AT&T Corp. v. FCC*, 317 F.3d 227, 235 (D.C. Cir. 2003); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997)); *see also MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) ("An agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise.").[7]

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[5] National Hispanic Media Coalition *et al.*, Joint Motion to Make Informal Open Internet Complaint Documents Part of the Record and to Set a Pleading Cycle for Comment on Them, *Restoring Internet Freedom*, WC Docket No. 17-108, at 1 (filed Sept. 18, 2017) ("NHMC Mot.").

[6] *See* FCC, *Response to NHMC FOIA Request*, https://www.fcc.gov/response-nhmc-foia-request (last visited Sept. 21, 2017) (noting that "7,044 pages" had been "provided … to [the] requestor" as of August 24, "13,311 pages" as of August 29, "21,432 pages" as of September 5, and "26,159 pages" as of September 14).

[7] *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), and the other cases on which NHMC relies (at 9-10), are inapposite. In those cases, the reviewing court faulted the Commission not for *failing* to consider extra-record materials—NHMC's complaint here—but for *relying* on extra-record materials or discussions and failing to disclose them. *See, e.g., Home Box Office,* 567 F.2d at 53-54 ("If actual positions were not revealed in public comments … and, further, if the Commission relied on these apparently more candid private discussions in framing the final pay cable rules, then the elaborate public discussion in these dockets has been reduced to a sham.").

Finally, it is no surprise that NHMC has avoided taking on that task because these informal complaints in fact add nothing of substance to the existing record, as any perusal of them will reveal. Many are garden-variety complaints about billing issues or service quality; others criticize well-known and oft-debated practices such as data allowances and parrot the talking points of interest groups like Free Press. Given the relentless efforts of such groups to identify any new broadband practice as it emerges and mischaracterize it as a threat to the open internet and a justification for Title II regulation, *see* AT&T Reply Comments 13-23, it is exceedingly unlikely that these informal complaints identify any net neutrality "problem" that these groups have somehow overlooked in their many massive submissions in this docket.